

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NO. CR18-5579 RBL

**UNITED STATES' SECOND MOTION  
FOR PROTECTIVE ORDER**

(1) CARLOS EDUARDO LOPEZ  
HERNANDEZ,  
(2) DANIEL OSVALDO ROCHA LOPEZ,  
(3) JAIME HEREDIA CASTRO,  
(4) JUAN AVILES BERRELLEZA,  
(5) EDGAR CABRERA,  
(6) OTHON ALONSO VEA CERVANTES  
(formerly charged under the name  
"Carlos Alejandro Castro Perez"),  
(7) CESAR LOYA SOTO,  
(8) MANUEL LOYA SOTO,  
(9) JULIAN GAUGE ORDONEZ,  
(10) JOSE LUIS SIERRA BARRIENTOS,  
(11) HECTOR MANUEL URIAS  
MORENO,  
(12) JORGE VALENZUELA ARMENTA,  
(13) URIEL ZELAYA,  
(14) ARTURO FRIAS CEBALLOS,  
(15) JUAN JOSE HIGUERA GONZALEZ,  
(16) JESUS RENE SARMIENTO  
VALENZUELA,  
(17) ALEK JAMES BAUMGARTNER,  
(18) MONIQUE GREEN,  
(19) ANDREW CAIN KRISTOVICH,  
(20) BRIAN LIVELY,

(21) JOSE RANGEL ORTEGA,  
 (22) GERALD KEITH RIGGINS,  
 (23) ESTHER LA RENA SCOTT,  
 (24) MICHAEL JOHN SCOTT,  
 (25) KAREN SURYAN,  
 (26) ORLANDO BARAJAS,  
 (27) OSCAR HUMBERTO CARRILLO  
 SALCEDO,  
 (28) MARTIN GONZALEZ JIMENEZ,  
 (29) HECTOR MARIO JACOBO  
 CHAIREZ,  
 (30) JESUS ALFONSO MORA  
 QUINONEZ,  
 (31) RAMON PUENTES, and  
 (32) GREGORY DAVID WERBER,

Defendants,

The United States of America, by and through Annette L. Hayes, United States Attorney for the Western District of Washington, Marci L. Ellsworth and Karyn S. Johnson, Assistant United States Attorneys for said District, hereby files this Second Motion for Protective Order.

### **I. BACKGROUND**

This case arose from a yearlong investigation conducted by the Drug Enforcement Administration (DEA) and other law enforcement agencies. As the investigation progressed, agents identified individuals in Mexico whom they believe are responsible for directing the activities of the co-conspirators not only in the Western District of Washington, but also in multiple other jurisdictions across the United States.

In its early stages, the investigation involved the use of a Confidential Source (CS1). The majority of the controlled buys between CS1 and the three courier codefendants were captured via video and/or audio recording. Additional identifying information about CS1 is included in some of the materials returned from search warrants served on Facebook.



U.S. 150 (1972). Broadly speaking, these rules, statute, and cases, respectively, provide the framework by which both parties are to produce discovery and by which a court can regulate discovery before trial; require the government to produce its witnesses' prior statements after they testify at trial; place an obligation on the government to learn of and disclose to the defense any exculpatory or impeachment evidence favorable to the defendant that is in the government's possession; and require the government to disclose information which could be used to impeach its witnesses. *See* Fed. R. Cr. Pro. 16; 18 U.S.C. § 3500(a); *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154-55.

There is otherwise "no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The government's discovery obligations are ongoing, but the government does not have to produce all of its discovery material at once and/or at the outset of the case. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("the duty to disclose is ongoing"), Local Rule 16(d) ("continuing duty to disclose"), Fed. R. Crim. P. 16 and 26.2 (disclosure of witnesses' prior statements not required until after witnesses testify on direct examination), Local Rule 16(f) (witness statements are to be produced "during the time of trial, or at any time if the parties agree").

It is well established that the government has a qualified privilege to withhold the identity of confidential sources. Indeed, as a general matter, there is no requirement that the identity of any government witnesses, including confidential sources, be revealed before trial. *See Weatherford*, 429 U.S. at 559 (no constitutional violation where government did not reveal identity of confidential informant before the informant testified at trial); Local Rule 16(f). To the contrary, "[t]he government has a limited privilege to withhold an informant's identity." *United States v. Henderson*, 241 F.3d 638, 645 (9th Cir. 2000) (citing *Roviaro v. United States*, 353 U.S. 53, 59-61 (1957)). "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement by preserving the anonymity of these informants." *United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (9th Cir. 1993) (citing *Roviaro*, 353 U.S. at 59).

### III. PROTECTIVE ORDER REQUEST

Pursuant to Fed. R. Crim. P. 16(d)(1), this Court has wide discretion to direct the disclosure and dissemination of discovery materials:

At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Fed. R. Crim. P. 16(d)(1).

The United States will provide defense counsel in this matter with discovery materials consistent with its discovery obligations under Rule 16 of the Federal Rules of Criminal Procedure, the Local Rules of the Western District of Washington, and *Brady v. Maryland* and its progeny. As stated above, the United States is requesting a Protective Order that would prohibit the dissemination of the Protected Material and the information contained therein.

In essence, pursuant to the proposed Protective Order, possession of the Protected Material would be limited to the attorneys of record in this case, and to any investigators, expert witnesses, and other agents that the attorneys of record hire in connection with this case (collectively referred to as "the defense team"). The defendants would be permitted to inspect and review the Protected Material in the presence of a member of the defense team, but would not be permitted to possess or maintain copies of the Protected Material. These proposed restrictions are designed to permit full use of the Protected Material and information contained therein in the preparation of the defendants' respective defenses, but to avoid dissemination of the Protected Material and the information therein to other persons who have no legitimate defense-related need for the information.

The Protective Order is especially important with respect to the defendants who are detained at FDC SeaTac. BOP legal counsel at FDC SeaTac has explained to the undersigned that there is no official written policy with respect to the sharing of Protected Material between inmates. Although FDC SeaTac complies with the terms of a court-

1 issued Protective Order inasmuch as they acknowledge that sharing of the Protected  
2 Material between inmates would be prohibited under the terms of the proposed Protective  
3 Order, the BOP cannot guarantee their ability to enforce such a prohibition. This could  
4 result in inmates working together in the cellblocks or law library to identify CS1. This  
5 could also result in other detained defendants from separate, unrelated cases learning the  
6 identity of CS1 and disseminating that information.

7 This is true regardless of whether the Protected Material is provided in hardcopy  
8 (i.e., paper) or electronic form. FDC SeaTac's local institutional policy on inmate legal  
9 activities generally affords detained defendants 2.5 hours a week of law library time,  
10 although defendants can request additional time. Electronic discovery – any material  
11 produced on a compact disc, whether audio files, video clips, or documents – can only be  
12 reviewed in the law library, as those are the only computers with disc drives that  
13 defendants can access.

14 Given the significant possibility that Protected Material could result in information  
15 regarding CS1 being disseminated to others with no legitimate defense-related need for it,  
16 the United States submits that entry of the proposed Protective Order – which would  
17 require defense counsel with a detained client to review the Protected Material in the  
18 same manner as defense counsel with a non-detained client – is the only reasonable  
19 method by which the United States and the Court can ensure the safety of CS1 and  
20 his/her family and associates.

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**IV. CONCLUSION**

Based on the facts outlined above, the United States respectfully requests that this Court issue a formal Protective Order that prohibits the reproduction or dissemination of the Protected Material.

DATED this 9th day of January, 2019.

Respectfully submitted,

ANNETTE L. HAYES  
United States Attorney

s/Marci L. Ellsworth  
MARCI L. ELLSWORTH  
Assistant United States Attorney